

**OFFICIAL OPINIONS OF THE ATTORNEY GENERAL**

AGO 2004-01 PUBLIC EMPLOYEES' BENEFITS PROGRAM; RETIREES; INSURANCE; LOCAL GOVERNMENT: A.B. 286 requires that all local jurisdictions provide health care plans for their retirees, either through their own health care plan or through PEBP, if the local government provides health care coverage to its active employees. If a local jurisdiction does not provide health benefit coverage for active employees, it is not required to provide health benefit coverage for retirees. However, if a local jurisdiction's plan for active employees excludes retirees because it is a "cafeteria plan," then it must find another method to provide health care coverage for its retirees. If a local jurisdiction terminates its health benefit coverage with PEBP for its active employees and offers health benefit coverage for those employees with another plan, then it must also offer health benefit coverage in the other plan to its retirees who are with PEBP. A.B. 286 requires open enrollment to be held for the entire period of September 1, 2003, through January 31, 2004. Although A.B. 286 does not specify an effective date, a date 30 days after the close of the open enrollment period is recommended. Local jurisdictions are required to offer reinstatement to their retirees who are in PEBP during the late open enrollment in even-numbered years, pursuant to NRS 287.0475. Nonstate retiree survivors have the same reinstatement right to the employer's health benefit plan as nonstate retirees. A local jurisdiction is required to reinstate survivors as PEBP participants after a retiree dies if the survivors are offered coverage under the COBRA and are not covered by the local jurisdiction's health plan after COBRA expires. A local jurisdiction must subsidize its retirees in the same amount as the State of Nevada subsidizes its retirees.

Carson City, January 7, 2004

P. Forrest Thorne, Executive Officer, Public Employees' Benefits Program,  
400 West King Street, Suite 300, Carson City, Nevada 89703-4222

Dear Mr. Thorne:

You have requested an opinion from this office regarding several questions involving Assembly Bill 286 of the 2003 legislative session, Act of June 11, 2003, ch. 493, 2003 Nev. Stat. \_\_\_\_ (A.B. 286).

BACKGROUND

The 2003 Legislature passed A.B. 286 in May 2003. The Assembly passed the bill on May 17, 2003, by a vote of 30 yeas, 7 nays, and 5 excused; and the Senate passed the bill on May 28, 2003, by a vote of 21 yeas, no nays, no excused. The Governor signed it into law on June 11, 2003. Section 8 of the

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bill was effective on July 1, 2003, with the remainder of the bill effective on October 1, 2003. At least three legislative committees held hearings on the bill. See *Hearing on A.B. 286 Before the Assembly Committee on Government Affairs*, 2003 Leg., 72d Sess. (March 19, 2003); *Hearing on A.B. 286 Before the Assembly Committee on Ways and Means*, 2003 Leg., 72d Sess. (April 7, 2003); and *Hearing on A.B. 286 Before the Senate Committee on Finance*, 2003 Leg., 72d Sess. (May 24, 2003).

A.B. 286 relates to health benefit coverage for public personnel. It requires, among other matters, that local jurisdictions pay a certain portion of the costs of health benefit coverage under the Public Employees' Benefits Program (PEBP) for persons retired from the service of the local jurisdiction (retirees) who join PEBP upon retirement. Section 9 of the bill exempts the bill from the requirement of NRS 354.599 that prohibits the Legislature from enacting laws requiring local jurisdictions to implement programs unless the legislature provides for the funding of such laws. NRS 354.599.

You have informed this office that your agency has been contacted by many of the approximately 85 local jurisdictions impacted by this bill, and that you have also been contacted by the Nevada League of Cities and the Nevada Association of Counties. These local jurisdictions and these associations have raised many questions which you have requested that we answer. A review of the legislative history does not reflect any opposition voiced by local jurisdictions during committee hearings on the bill.

### QUESTION ONE

Does Assembly Bill 286 (A.B. 286) mandate that all local jurisdictions provide for a health benefit plan for their retirees?

### ANALYSIS

Local jurisdictions include counties, school districts, municipal corporations, political subdivisions, public corporations, or other public agencies of the State of Nevada. NRS 287.023(1). Section 1, paragraph 4, of A.B. 286 mandates that local jurisdictions either pay "the cost, or any part of the cost, of group insurance and medical and hospital service coverage established pursuant to NRS 287.010 or 287.020 for persons who continue that coverage pursuant to subsection 1 [of NRS 287.023]" or pay "the same portion of the cost of coverage under the Public Employees' Benefits Program for persons who join the Program upon retirement pursuant to subsection 1 [of NRS 287.023] as the State pays pursuant to subsection 2 of NRS 287.046 for

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persons retired from state service who have continued to participate in the Program.”

In other words, if a local jurisdiction provided health benefits to an employee before retirement, then the local jurisdiction must provide the employee after retirement the option of continuing coverage under the local jurisdiction health plan or joining PEBP. Paragraph 2 of section 8 of A.B. 286 mandates that local jurisdictions have an open enrollment period during which eligible retired persons have the option of joining the group insurance or medical and hospital service established by the local jurisdiction. This mandate only applies to local jurisdictions that offer a health plan to their active employees.

The requirement that local jurisdictions provide health benefits to retirees only applies to retirees who were covered or had their dependents covered by group insurance or medical and hospital service at the time of retirement. NRS 287.023(1). Therefore, if a local jurisdiction did not provide health benefits to active employees, there would be no requirement that the local jurisdiction provide such benefits to its retirees.

### CONCLUSION TO QUESTION ONE

Assembly Bill 286 (A.B. 286) mandates that all local jurisdictions provide health care plans for their retirees either through their own health care plan or through the Public Employees’ Benefits Program, if the local government provides health care coverage to its active employees. A.B. 286 does not require a local jurisdiction to provide health benefit coverage for retirees if the local jurisdiction does not provide health benefit coverage for active employees.

### QUESTION TWO

If a local jurisdiction only offers a health benefit plan to its active employees through a “cafeteria plan” (in which retirees are not currently eligible), what is the local jurisdiction’s obligation to provide retirees with health benefit coverage?

### ANALYSIS

The Internal Revenue Service (IRS) defines a “cafeteria plan” as “a written plan that allows . . . employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from wages.” IRS, Official Announcements, Notices, and News

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Releases; *Tax Analysts, Tax Notes Today*, February 26, 2003; *see also* 26 U.S.C. § 125.

A.B. 286 does not provide for any exemptions from the requirement that local jurisdictions either provide health care coverage through their own plan or PEBP. If a local jurisdiction provides its active employees with health care coverage through a “cafeteria plan,” and the plan specifically excludes retirees, then the local jurisdiction must find another method to provide health care coverage for its retirees. For example, it could subsidize<sup>1</sup> its retirees through PEBP.

### CONCLUSION TO QUESTION TWO

Assembly Bill 286 obligates local jurisdictions to provide its retirees with health care coverage under certain circumstances. If a local jurisdiction’s plan for active employees excludes retirees because it is a “cafeteria plan,” then the local jurisdiction must find another method to provide health care coverage for its retirees, such as subsidizing its retirees through the Public Employees’ Benefits Program.

### QUESTION THREE

If a local jurisdiction terminates its health benefit coverage with the Public Employees’ Benefits Program (PEBP) for its active employees and offers health benefit coverage for its active employees with another plan, must it also offer health benefit coverage in the other plan to any of its retirees who are with PEBP?

### ANALYSIS

A.B. 286 requires local jurisdictions to provide health benefit coverage for their retirees. Therefore, if a local jurisdiction terminates its health benefit coverage with PEBP for its active employees and offers this coverage to them with another plan, the local jurisdiction must also offer the same coverage to its retirees.

### CONCLUSION TO QUESTION THREE

If a local jurisdiction terminates its health benefit coverage with the Public Employees’ Benefits Program (PEBP) for its active employees and offers

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<sup>1</sup> “Subsidy” means the state or local jurisdiction’s share of the cost of premiums or contributions for group insurance for each public officer or employee, or each person who is retired from the service of this State or from a local jurisdiction who continues to participate or elects to participate in PEBP. For the amount of the state subsidy see A.B. 544, Act of June 11, 2003, ch. 439, 2003 Nev. Stat. \_\_\_\_.

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health benefit coverage for its active employees with another plan, then it must also offer health benefit coverage in the other plan to its retirees who are with PEBP.

### QUESTION FOUR

Do nonstate<sup>2</sup> retiree survivors have the same reinstatement right to the employer's health benefit plan as nonstate retirees?

### ANALYSIS

A.B. 286 amends and clarifies NRS 287.0475 dealing with reinstatement of insurance by a retired public officer or employee, or his or her spouse, regardless of whether the public officer or employee retired from the state or from a local jurisdiction. NRS 287.0475 previously allowed a retired public employee, or the surviving spouse of such a retired public employee, to reinstate any insurance, except life insurance, which was provided at the time of retirement by fulfilling certain criteria enumerated in NRS 287.0475. A.B. 286 clarifies that this ability to reinstate certain insurance also applies to public officers. It also states that the last public employer of a retired officer or employee who reinstates certain insurance must "commingle the claims experience of such persons with the claims experience of active and retired officers and employees and their dependents who participate in that group insurance or medical and hospital service" for the purpose of establishing actuarial data to determine rates and coverage for such persons. NRS 287.0475(3), as amended by A.B. 286.

### CONCLUSION TO QUESTION FOUR

Nonstate retiree survivors have the same reinstatement right to the employer's health benefit plan as nonstate retirees, pursuant to NRS 287.0475.

### QUESTION FIVE

Does Assembly Bill 286 require open enrollment to be held for the entire period of September 1, 2003, through January 31, 2004?

### ANALYSIS

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<sup>2</sup> "Nonstate" means the governing body of any county, school district, municipal corporation, political subdivision, public corporation, or other local governmental agency. See Proposed Regulation of the Board of the Public Employees' Benefits Program, November 26, 2003.

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A.B. 286 states: “Each governing body shall have a period of open enrollment between September 1, 2003, and January 31, 2004, during which eligible retired persons described in subsection 1 may join the group insurance or medical and hospital service established by the governing body pursuant to NRS 287.010 or 287.020.” A.B. 286, sec. 8, para. 2.

This language is clear that the period of open enrollment is for the entire five-month period from September 1, 2003, through January 31, 2004. The legislative history for A.B. 286 also supports this conclusion. If the language were ambiguous, the following rules of statutory construction could be used. These rules are not necessary in this case because the language is clear; however, the rules and the legislative history support the same conclusion.

Nevada courts, when analyzing statutory language, are guided by the following rules. “When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.” *Coast Hotels & Casinos v. State Labor Comm’n*, 117 Nev. 835, 840, 34 P.3d 546, 550 (2001). “In construing a statute, this court must give effect to the literal meaning of its words.” *Diamond v. Swick*, 117 Nev. 671, 675, 28 P.3d 1087, 1089 (2001). These rules of statutory construction support the conclusion that the open enrollment period is for the entire five-month period. The language is clear and is supported by the legislative history for this bill.

Assemblywoman Koivisto, the primary sponsor of the bill, testified before the Assembly Committee on Government Affairs and explained the open enrollment period by stating:

What A.B. 286 does is create an open enrollment period for folks from non-state entities to go back to the health insurance system of the entity that they retired from. It’s a one-time shot. They take the option or not, one time. If they choose to do that, they’re not rated separately, they’re rated with the pool. If they decide not to go back to the entity they retired from, if they want to stay with PEBP, their former employer will pay a subsidy to PEBP, like the state pays for state retirees, and there is a difference.

*Hearing on A.B. 286 Before the Assembly Committee on Government Affairs*, 2003 Leg., 72d Sess. 3 (March 19, 2003).

The above testimony provided by Assemblywoman Koivisto, as the primary sponsor on the bill, reveals the legislative intent for this part of the

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legislation. This declaration of purpose is helpful in determining how long the Legislature intended for this initial open enrollment period to last. In addition to this stated intent, the plain language of the section specifies that this one-time period of open enrollment will be for the entire time between September 1, 2003, and January 31, 2004.

### CONCLUSION TO QUESTION FIVE

Assembly Bill 286 requires open enrollment to be held for the entire period of September 1, 2003, through January 31, 2004.

### QUESTION SIX

A.B. 286 does not specify the effective date for the election of health benefits made during the above-mentioned open enrollment. Therefore, what is the effective date?

### ANALYSIS

Often, the effective date is 30 days after the close of open enrollment. For example PEBP, through its Summary Plan Document, states that the effective date for the election of health benefits made during an open enrollment period is the first day of the plan year. The plan year begins on July 1. Open enrollment is then closed at the end of May, providing 30 days between the end of the open enrollment period and the effective date of the changes.

While A.B. 286 is silent regarding this issue, making the effective date 30 days after the close of open enrollment would be reasonable and consistent with the current practice of PEBP. Having a shorter time period would not allow administrators the necessary time to process the documentation needed for implementation. Having a longer time period is unfair to participants who must wait for their coverage to begin. This office therefore recommends that the effective date be March 1, 2004.

### CONCLUSION TO QUESTION SIX

This office recommends that the effective date be 30 days after the close of the open enrollment period stated in section 8 of Assembly Bill 286, which would be March 1, 2004.

### QUESTION SEVEN

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Must a local jurisdiction subsidize its retirees in the same amount that the State of Nevada subsidizes its retirees, or could a local jurisdiction provide a greater or lesser subsidy?

### ANALYSIS

A.B. 286 amended NRS 287.023(4) to currently read:

4. The governing body of any county, school district, municipal corporation, political subdivision, public corporation or other public agency of this state:

....

(b) Shall pay the same portion of the cost of coverage under the Public Employees' Benefits Program for persons who join the Program upon retirement pursuant to subsection 1 as the State pays pursuant to subsection 2 of NRS 287.046 for persons retired from state service who have continued to participate in the Program.

A.B. 286, section 1.

NRS 287.046 is a statute that addresses the payment of premiums or contributions. It, too, was amended by A.B. 286. The amendment, found in section 6 of A.B. 286, requires that:

Any deduction from the compensation of an employee for the payment of a premium or contribution for health insurance must be based on the actual amount of the premium or contribution after deducting any amount of the premium or contribution which is paid by the department, agency, commission or public agency that employs the employee.

NRS 287.046(1), as amended by A.B. 286. This amendment does not impact the amount of state subsidy that the State pays for its employees.

The amended language to NRS 287.023(4), found in section 1 of A.B. 286, provides that the governing body of any county, school district, municipal corporation, political subdivision, public corporation, or other public agency of the State shall pay the same subsidy for its retirees as the State pays for its retirees. If the language of a statute is clear and unambiguous, there is no need to interpret the statute in any way. *Coast Hotel*, 117 Nev. 840. The language here is clear. The subsidies must be the same.

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### CONCLUSION TO QUESTION SEVEN

A local jurisdiction must subsidize its retirees in the same amount as the State of Nevada subsidizes its retirees.

### QUESTION EIGHT

Does Assembly Bill 286 require the subsidy to be paid for future nonstate retiree participants in the Public Employees' Benefits Program (PEBP) or just for current nonstate retiree participants in PEBP?

### ANALYSIS

The new language added to NRS 287.023(4) by A.B. 286 in section 1 states, in pertinent part, that local jurisdictions will pay the subsidy "for persons who join the Program upon retirement." This language does not differentiate between current and future retirees. It requires local jurisdictions to pay the subsidy for any person who joins the Program upon retirement. Persons who retire in the future and join the Program<sup>3</sup> will have the same subsidy for health care paid by local jurisdictions as the State pays for state retirees.

### CONCLUSION TO QUESTION EIGHT

Assembly Bill 286 requires the subsidy for health care to be paid for future nonstate retiree participants in the Public Employees' Benefits Program as well as for current nonstate participants.

### QUESTION NINE

Are local jurisdictions required to offer reinstatement to their retirees who are in the Public Employees' Benefits Program during the late open enrollment in even-numbered years?

### ANALYSIS

NRS 287.0475 deals with reinstatement of insurance by a retired public employee or his or her spouse. A.B. 286 amended NRS 287.0475 in section 7 of the bill. The amendment clarifies that this provision applies to public officers as well as public employees and adds a new section that explains the

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<sup>3</sup> "Program" is defined in NRS 287.0406 to mean "the public employees' benefits program established pursuant to subsection 1 of NRS 287.043."

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method that the last public employer of a retired officer or employee who reinstates insurance will use in certain instances to determine the rates and coverage. Section 1 of NRS 287.0475 states:

A public officer or employee who has retired pursuant to NRS 1A.350 or 1A.480, or 286.510 or 286.620,<sup>4</sup> or a retirement program provided pursuant to NRS 286.802,<sup>5</sup> or the surviving spouse of such a retired public officer or employee who is deceased may, in any even-numbered year, reinstate any insurance, except life insurance, which was provided to him and his dependents at the time of his retirement pursuant to NRS 287.010 or 287.020<sup>6</sup> or the program as a public officer or employee by: [the statute then lists three requirements that must be met].

....

The last public employer shall give the insurer notice of the reinstatement no later than March 31, of the year in which the public officer or employee or surviving spouse gives notice of his intent to reinstate the insurance.

This section of the statute permits eligible retired persons to reinstate certain insurance with the retired person's last public employer during an even-numbered year.

### CONCLUSION TO QUESTION NINE

Local jurisdictions are required to offer reinstatement to their retirees who are in the Public Employees' Benefits Program during the late open enrollment in even-numbered years pursuant to NRS 287.0475.

### QUESTION TEN

What effect does Assembly Bill 286 have on health care benefits that a local jurisdiction may have as a result of collective bargaining?

### ANALYSIS

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<sup>4</sup> NRS 1A.350 and NRS 1A.480 deal with retirement eligibility under the Judicial Retirement Plan. NRS 286.510 and NRS 286.620 deal with retirement eligibility under the Public Employees' Retirement plan.

<sup>5</sup> NRS 286.802 deals with retirement for members of the University of Nevada Retirement Program.

<sup>6</sup> NRS 287.010 and NRS 287.020 authorize a public agency to adopt a system of group insurance and medical services and hospitalization.

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This office has not examined any local jurisdiction's health plans that are a result of collective bargaining. Whether or not health benefits are negotiated pursuant to a collective bargaining agreement, certain health benefits are required by statute and the local jurisdiction must, at a minimum, meet the statutory requirements enumerated in section 1 of A.B. 286.

### CONCLUSION TO QUESTION TEN

Whether health benefits are derived from collective bargaining or from some other means, these benefits must meet the statutory requirements of section 1 of Assembly Bill 286.

### QUESTION ELEVEN

Some government entities have converted to nonprofit entities, such as hospitals. If the nonprofit entity has retiree participants in the Public Employees' Benefits Program, is the entity required to subsidize these retirees?

### ANALYSIS

A.B. 286 does not distinguish the mechanism by which the local jurisdiction entity handles employee benefits. Courts in other states have held that nonprofits which are "state actors" can be treated similarly to state agencies. For example, in West Virginia the Supreme Court of Appeals stated that "some corporations for limited purposes can be found to be a state actor subject to the same duties as state agencies and officials." *West Virginia ex rel. Lambert v. County Commission of Boone County*, 452 S.E.2d 906, 919 (W.Va. 1994). In the *Lambert* case, the Green Acres Regional Center, Inc., a private nonprofit corporation, elected to participate in a state retirement program. The court stated that:

By making this election, Green Acres elected to take on a public duty to provide retirement benefits to its employees under the statutes governing PERS [the Public Employees Retirement System]. It would be illogical to allow Green Acres to reap the benefits of a state retirement program without being responsible for its duties imposed by that program.

*Id.*

No facts were provided as to whether the government entities that have converted to nonprofit corporations participate in PEBP, Nevada's PERS, or

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other government programs. If these nonprofit corporations participate in these government programs, then it would be clear that these nonprofit corporations have elected to take on a public duty (providing state health or retirement benefits), and would therefore be required to subsidize their retirees. Without such facts, this office is able only to conclude that nonprofit corporations, under certain circumstances, may be required to subsidize their retired participants in PEPP.

### CONCLUSION TO QUESTION ELEVEN

Government entities that have converted to nonprofit entities, such as hospitals, and that have retiree participants in the Public Employees' Benefits Program, may be required to subsidize these retirees.

### QUESTION TWELVE

What are the legal consequences if a local jurisdiction does not comply with the mandates enumerated in Assembly Bill 286?

### ANALYSIS

NRS 287.023(4), as amended by A.B. 286, directs local jurisdictions to either provide health care plans for their retirees through their own health care plan or through PEPP. This statute also mandates that local jurisdictions pay a health care subsidy for each retiree. *See* Question One above. Providing health care for retirees of local jurisdictions and subsidizing a portion of the cost of that health care is thus a statutory obligation of the local jurisdictions.

There is no criminal or civil penalty set forth in the chapter for failure to comply with the statute. However, if a local jurisdiction were to fail to comply with this obligation, a legal action for a writ of mandamus could be initiated to achieve compliance with the statute. A writ of mandamus "may be issued by the supreme court, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; . . . ." NRS 34.160. Local jurisdictions have a duty to provide health care plans for their retirees and to subsidize the cost. If a local jurisdiction failed to provide such a health care plan or to subsidize the cost, a court could compel that performance through a writ of mandamus.

The Nevada Supreme Court has opined on the use of a writ of mandamus to compel a county to pay statutory obligations. In *State ex rel. Walsh v. Buckingham*, 58 Nev. 342, 80 P.2d 910 (1938), a bond holder brought a

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proceeding in mandamus against county officials to compel the payment of certain bonds. The Court issued a peremptory writ of mandate because the county had not performed its duty. *Id.* at 350.

Consistent with the Nevada Supreme Court's reasoning in *Walsh*, a California court issued a peremptory writ of mandate against the state after the state board of control had refused to pay an admittedly valid claim by a county relating to the state's portion of funding for mental health services. The writ was issued because the board of control had no discretion to deny the claim. *County of Sacramento v. Loeb*, 160 Cal. App. 3d 446 (1984).

In NRS 287.023(4), the only discretion given to local jurisdictions is whether to provide health care plans for their retirees through their own health care plan or through PEBP. There is no discretion regarding the provision of health care, only as to which plan to use. A local jurisdiction has no discretion as to the subsidy.

### CONCLUSION TO QUESTION TWELVE

If a local jurisdiction does not comply with the mandates enumerated in Assembly Bill 286, a legal proceeding for a writ of mandamus could be initiated to force compliance.

### QUESTION THIRTEEN

Does Assembly Bill 286 require a local jurisdiction to reinstate survivors as the Public Employees Benefits Program participants after a retiree dies if the survivors are offered coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and are not covered by the local jurisdiction's health plan after COBRA expires?

### ANALYSIS

A.B. 286 does not address the specific scenario described in Question 13. However, NRS 287.0475 addresses reinstatement of certain insurance by an eligible retired public employee, or his or her spouse. A.B. 286 amended NRS 287.0475 in section 7 of the bill. NRS 287.0475(1) permits an eligible retiree, or his or her surviving spouse, to reinstate in any even-numbered year certain insurance which was provided to him and his dependents at the time of his retirement by fulfilling the three provisions enumerated in the statute. Those provisions are: (1) written notice of their intent to reinstate the insurance must be provided to their last public employer not later than January 31 of an even-

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numbered year (NRS 287.0475(1)(a)); (2) they must accept the public employer's current program or plan of insurance and any subsequent changes thereto (NRS 287.0475(1)(b)); and (3) they must pay any portion of the premiums or contributions of the public employer's program or plan of insurance, in the manner set forth in NRS 1A.470 or 286.615, which are due from the date of reinstatement and not paid by the public employer (NRS 287.0475(1)(c)). The retiree or the surviving spouse chooses whether to participate in the health insurance plan of the local jurisdiction or PEBP. NRS 287.023(1).

Local jurisdictions are required to offer their health plans to eligible retirees and eligible dependents. *See* NRS 287.023, as amended by A.B. 286. Once a local jurisdiction offers a health plan to active employees, it must also offer the plan to eligible retirees and eligible dependents, and those eligible dependents may reinstate if they comply with NRS 287.0475(1). The eligible retiree or eligible dependent makes the choice of which plan to participate in.

It is the retiree who chooses which health plan to participate in, the local jurisdiction's or the Public Employees' Benefits Program's. In the scenario offered, if the retiree dies and is participating in PEBP at the time of death, the survivor has the option of reinstating into the local jurisdiction's health plan. Local jurisdictions must offer their health plans to eligible survivors, so there would not be a situation in which an eligible survivor is not covered by a local jurisdiction's health plan.

### CONCLUSION TO QUESTION THIRTEEN

Assembly Bill 286 requires a local jurisdiction to reinstate survivors as the Public Employees Benefits Program participants after a retiree dies if the survivors are offered coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and are not covered by the local jurisdiction's health plan after COBRA expires.

BRIAN SANDOVAL  
Attorney General

By: KATERI CAVIN  
Senior Deputy Attorney General

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AGO 2004-02 BALLOTS; FUNDS; ADVERTISING: Public funds can be expended to support a ballot question only to create or disseminate a television program that provides a forum for discussion or debate regarding the ballot question, provided that persons both in support of and in opposition to the ballot question participate in the television program.

Carson City, February 9, 2004

Patricia A. Lynch, Reno City Attorney, P.O. Box 1900, Reno, Nevada 89505

Dear Ms. Lynch:

You have requested an opinion from this office on the expenditure of public funds to support a ballot question.

### BACKGROUND

The City of Reno (City) is considering conducting a public relations campaign to inform the public about positive results from the City's street improvement and maintenance program. The City then anticipates placing a renewal of the 1993 Tax Override on the ballot in order to fund future street improvements and maintenance.

### QUESTION

When can public funds be expended to support a ballot question?

### ANALYSIS

Senate Bill 123 of the 2003 legislative session provides at section 1: "Except as otherwise provided in subsections 4 and 5, a public officer or employee shall not request or otherwise cause a governmental entity to incur an expense or make an expenditure to support or oppose: (a) A ballot question. (b) A candidate." Act of May 22, 2003, ch. 179, § 1, 2003 Nev. Stat. \_\_\_\_\_. The exception at subsection 5 provides: "The provisions of this section do not prohibit an expense or an expenditure incurred to create or disseminate a television program that provides a forum for discussion or debate regarding a ballot question, if persons both in support of and in opposition to the ballot question participate in the television program." *Id.*

Other than the television forum provided for in subsection 5, there is no other exception allowing the expenditure of public funds to support a ballot question. The statute provides a clear prohibition and an equally clear, limited

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exception. “Where the language of a statute is plain and unambiguous, and its meaning is clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” *Del Papa v. Board of Regents*, 114 Nev. 388, 392, 956 P.2d 770, 774 (1998), citing *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922).

CONCLUSION

Public funds can be expended to support a ballot question only to create or disseminate a television program that provides a forum for discussion or debate regarding the ballot question, provided that persons both in support of and in opposition to the ballot question participate in the television program.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

By: JONATHAN L. ANDREWS  
Special Assistant Attorney General

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AGO 2004-03 LEGISLATURE; CONSTITUTIONAL GOVERNMENT; LOCAL GOVERNMENT; EMPLOYEES (STATE): Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the executive branch of government and simultaneously serving as a member of the Nevada State Legislature. The constitutional requirement of separation of powers is not applicable to local governments; accordingly, absent legal restrictions unrelated to the separation of powers doctrine, a local government employee may simultaneously serve as a member of the Nevada Legislature.

Carson City, March 1, 2004

Honorable Dean Heller, Secretary of State, State of Nevada, 101 North Carson Street, Suite 3, Carson City, Nevada 89701

Dear Secretary Heller:

You have requested this office to clarify and/or reconcile certain opinions of the Nevada Attorney General and the Nevada Legislative Counsel Bureau (LCB) regarding the separation of powers doctrine contained in Article 3, Section 1 of the Nevada Constitution. Your request indicates that three previous opinions issued by this office, and two previous opinions issued by LCB,<sup>1</sup> result in conflicting conclusions as to whether a state or local government employee is eligible to simultaneously serve as a member of the Nevada State Legislature (dual service) without violating the Nevada Constitution's separation of powers doctrine.<sup>2</sup> In reaching a conclusion, this opinion will address the aforementioned opinions and review other relevant legal authority.

### QUESTION

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<sup>1</sup> Those opinions are: Op. Nev. Att'y Gen. No. 183 (July 9, 1952); Op. Nev. Att'y Gen. No. 168 (May 22, 1974); Ltr. Nev. Att'y Gen. (January 28, 2002); Ltr. Op. Nev. LCB to Assemblyman Lynn Hettrick (February 4, 2002); and Ltr. Op. Nev. LCB to Assemblyman Jason Geddes (January 23, 2003).

<sup>2</sup> For purposes of this opinion, the analysis will not address the principles of "incompatibility," which is a tenet of law that generally states a person may hold more than one position in government so long as the positions are not legally incompatible. This opinion solely concerns the interpretation and application of the separation of powers provision contained in Article 3, Section 1 of the Nevada Constitution.

Under Nevada law, the statutory rules of incompatibility can be found primarily in chapters 241 and 281 of the Nevada Revised Statutes, and the constitutional rules of incompatibility can be found at NEV. CONST. art. 4 § 8; art. 4 § 9; art. 5 § 12; and art. 6 § 11. Generally speaking, the common law doctrine of incompatibility operates to supplement any constitutional or statutory provisions. Our research has not found any Nevada case law addressing the common law doctrine of incompatibility as it applies to a person who holds a position in state government.

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

Can executive branch and local government employees dually serve as members of the Nevada State Legislature without violating the separation of powers doctrine of Article 3, Section 1 of the Nevada Constitution?

### INTRODUCTION

The question of whether executive branch and local government employees can dually serve as members of the Nevada State Legislature, in conformance with Article 3, Section 1 of the Nevada Constitution, has never been reviewed by the Nevada Supreme Court. Although the Court has not addressed this specific question, it has devoted considerable thought to the separation of powers doctrine.

In affirming that the separation of powers is “probably the most important single principle of government declaring and guaranteeing the liberties of the people,” the Nevada Supreme Court in *Galloway v. Truesdell*, 83 Nev. 13, 422 P.2d 237 (1967), declared:

. . . [T]he extent to which a country can successfully resolve the conflict between the three branches of government is to a very great extent the measure of that country’s capacity for self-government.

*Id.* at 18, quoting Hon. Arthur T. Vanderbilt, *THE DOCTRINE OF SEPARATION OF POWERS* (1953).

The *Truesdell* Court, in recognition of the magnitude of this issue, opined even further:

*The separation of powers; the independence of one branch from the others; the requirement that one department cannot exercise the powers of the other two is fundamental in our system of government.*

83 Nev. at 19 (emphasis added).

Indeed, in a more contemporary decision, the Nevada Supreme Court did not hesitate to reaffirm its unyielding adherence to the separation of powers doctrine. In *Whitehead v. Comm’n on Jud. Discipline*, 110 Nev. 874, 879, 878 P.2d 913 (1994), the Court relied upon *THE FEDERALIST* to emphasize that “[t]he division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people.”

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This principle is also of Federal Constitutional dimension and has occupied a position of unquestioned importance since the early days of the Republic. As James Madison noted in *The Federalist* No. 47, “[w]ere the power of judging joined . . . to the executive power, the judge might behave with all the violence of the oppressor” (quoting Montesquieu).

*Id.* at 879, citing *Galloway v. Truesdell*, 83 Nev. 13 (1967).

. . . [t]here can be no liberty \* \* \* if the power of judging be not separated from the legislative and executive powers. \* \* \* Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be the legislator.

*Galloway v. Truesdell*, 83 Nev. 13, 19 (1967), citing *City of Enterprise v. State*, 69 P.2d 953 (Ore. 1937).

In the *Truesdell* and *Whitehead* cases, the Nevada Supreme Court was presented with the questions of whether the judicial branch could perform legislative functions and an officer of the executive branch could perform judicial functions. In both instances, the Court soundly rejected such a notion, finding that such conduct would violate the principle of separation of powers contained in Article 3, Section 1 of the Nevada Constitution.

The question presented in this opinion raises the same dilemma but concerns, for the first time, executive branch and local government employees’ service in the Nevada Legislature. Because of the Nevada Supreme Court’s strict observance of the principle of separation of powers in the context of the executive and legislative branches versus the judicial branch in *Truesdell* and *Whitehead*, this office will give considerable weight to these decisions in the present analysis.

### ANALYSIS

#### A. The Legislative Branch.

In examining the question presented in this opinion, it is important to consider and understand the duties, functions, and powers of the legislative and executive branches of the Nevada state government. The Nevada Constitution is where one begins such an analysis.

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The framers of the Nevada Constitution succinctly stated in Article 4, Section 1 of the document:

The legislative authority of this State shall be vested in a Senate and Assembly which shall be designated “The Legislature of the State of Nevada” and the sessions of such Legislature shall be held at the seat of government of the State.

Soon after the Constitution was adopted, the Nevada Supreme Court recognized the importance of the “practically absolute” power of the Legislature. *See Gibson v. Mason*, 5 Nev. 283 (1869). “The foundation of our government, is that all political power originates with the people.” *Id.* at 291. Certain specific powers have been vested in the Federal Government pursuant to the U.S. Constitution. The remaining powers are retained by the people and are exercised through state governments. The legislative power of the people of the State of Nevada is vested in the state legislature, and such power is unlimited except by the federal Constitution and such restrictions as are expressly placed on it by the state Constitution.

The Nevada Supreme Court later reaffirmed its precedent with regard to legislative power in *Truesdell*:

Briefly stated, legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is indeed very broad, and, except where limited by Federal or State Constitutional provisions, that power is practically absolute.

83 Nev. at 20.

### B. The Executive Branch.

The framers of the Nevada Constitution were also very precise with regard to their description of the executive branch of government. Article 5, Section 1 of the document states: “The Supreme Executive Power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada.”

The Nevada Supreme Court in *Truesdell* again took the opportunity to define constitutional powers by describing the power of the executive branch of government:

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The executive power extends to the carrying out and enforcing the laws enacted by the Legislature. Except where there is a constitutional mandate or limitation, the Legislature may state which actions the executive shall or may not perform.

*Id.*

The executive branch of the State of Nevada consists of the constitutional officers, a plethora of state departments and their divisions and employees, state boards and commissions, and state agencies. *See, e.g.*, NRS 223–228 (Constitutional Officers); NRS 232 (Departments and Divisions: Conservation and Natural Resources; Administration; Human Resources; Business and Industry; Employment, Training and Rehabilitation); NRS 232A (Boards, Commissions and Similar Bodies); NRS 233 (Nevada Equal Rights Commission); NRS 385 (Department of Education); NRS 396 (University and Community College System of Nevada); NRS 408 (Department of Transportation); NRS 622–656A (Occupational Licensing Boards).

Employees serving in the executive branch exercise executive functions whether carrying out and enforcing laws or exercising ministerial functions. *See Truesdell*, 83 Nev. at 20-22.

### C. Ministerial functions of the branches of government.

The *Truesdell* Court did not stop with a description of the executive and legislative powers of state government. It also took the necessary step of delineating the confusion that might arise with regard to the perceived overlap between the duties and powers of employees of the three branches of government (legislative, executive, and judicial).

The Court explained:

As previously expressed above, in addition to the constitutionally expressed powers and functions of each Department (Legislative and Executive) each possesses inherent and incidental powers that are properly termed *ministerial*. Ministerial functions are methods of implementation to accomplish or put into effect the basic function of each Department. No Department could properly function without the inherent ministerial functions. Without the inherent powers of ministerial functions each Department would exist in a vacuum. It would be literally

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helpless. It is because of the inherent authority of ministerial functions that the three departments are thus linked together and able to form a co-ordinated and interdependent *system of government*. While the Departments become a co-ordinated, efficient system under such a process, yet each Department must maintain its separate autonomy.

*Id.* at 21 (italics emphasis supplied; underline emphasis added).

The *Truesdell* Court recognized the reality and necessity that the three branches of government are linked together to form a coordinated and interdependent system of government. However, it highlighted the fact that although there are commonalities between the branches of government, each branch must maintain its *separate autonomy*.

### D. Risks associated with overlapping functions of government.

The *Truesdell* Court did more than just warn about the risks associated with overlapping functions between the three branches of government. It also articulated the consequences of such a merger and the destructive results that would come about if such an encroachment were allowed to occur:

However, it is in the area of inherent ministerial powers and functions that prohibited encroachments upon the basic powers of a Department most frequently occur. *All Departments must be constantly alert to prevent such prohibited encroachments lest our fundamental system of governmental division of powers be eroded.*

*To permit even one seemingly harmless prohibited encroachment and adopt an indifferent attitude could lead to very destructive results. . . .*

*It is essential to the perpetuation of our system that the principle of separation of powers be understood. The lack of understanding about the principle is widespread indeed, and creates a problem of no small proportions. There must be a fullness of conception of the principle of the separation of powers involving all of the elements of its meaning and its correlations to attain the most efficient functioning of the governmental system, and to attain the maximum protection of the rights of the people.*

*Id.* at 22 (emphasis added).

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Based on the foregoing, the Nevada Supreme Court has plainly stated its intention to prohibit even “harmless” encroachments upon the “fundamental system of governmental division of powers.” Such a statement is extremely significant to whether executive branch and local government employees can serve in the state legislature.

However, prior to reaching a conclusion on this issue, it is important to further examine whether the separation of powers doctrine contained in Article 3, Section 1 of the Nevada Constitution applies to executive branch and local government employees who also would serve in the Nevada Legislature.

### E. The Nevada Separation of Powers Doctrine

Article 3, Section 1 of the Nevada Constitution states:

**Section 1. Three separate departments; separation of powers; legislative review of administrative regulations.**

1. The powers of the Government of the State of Nevada shall be divided into three separate departments, --the Legislative, --the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted in this constitution.

### F. The Federalist Papers and the Separation of Powers

The Nevada Supreme Court in *Truesdell* and *Whitehead* recognized the importance of the separation of powers to our system of government and even referred to THE FEDERALIST No. 47 as authority to emphasize that the roots of the doctrine reach far beyond the creation of the Nevada Constitution. Indeed, upon reviewing additional works within THE FEDERALIST PAPERS, this office finds that there are additional valuable references contained within these works.

On February 8, 1788, in THE FEDERALIST No. 51, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, history notes that either Alexander Hamilton or James Madison wrote, in pertinent part, to the people of New York:

*But the great security against a gradual concentration of the several powers in the same department, consists in giving*

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*to those who administer each department the necessary constitutional means and personal motives to resist encroachments of others.* [Emphasis added.]

It is clear that Hamilton and Madison anticipated the problems associated with overlap in the branches of government and the mischief that could occur if such encroachment were allowed to proceed unchecked.

Later, on March 18, 1788, in THE FEDERALIST No. 71, *The Duration in Office of the Executive*, Hamilton wrote to the people of New York:

The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal, and incapable of producing the ends for which it was established. *It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government; and, whatever may be the forms of the Constitution, unites all power in the same hands.* [Emphasis added.]

Again, Hamilton voiced the importance in maintaining the independence of the respective branches of government.

The above FEDERALIST PAPERS highlight the founders' concerns with regard to the independence of the branches of government and their concern with the effect upon liberty if too much power was concentrated in one branch. As such, THE FEDERALIST PAPERS/ are quite instructive in the instant analysis. The concerns raised by the founders with regard to the separation of powers are as relevant to the question presented in this opinion as they were 216 years ago.

### G. Dual service across the U.S.

Dual service in federal legislative and executive positions has generally been addressed through federal law. However, the prevalence of the part-time

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citizen legislature across the United States has caused the dual service question to be considered more frequently in other states.

Other states are not consistent in their regulation, prohibition, and allowance of dual service. They address dual service through various combinations of constitutional, statutory, and common-law restrictions, making this a complex and conflicting issue of law and policy.

However, it is important to note that the framers of the Nevada Constitution modeled the Nevada Constitution after the California Constitution. *See State of Nevada, ex rel. Harvey v. Second Judicial District Court*, 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001), wherein the Nevada Supreme Court held that:

. . . since Nevada relied upon the California Constitution as a basis for developing the Nevada Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of the . . . language in the California Constitution.

Indeed, Article 3, Section 1 of the Nevada Constitution is *identical* to the then-California separation of powers provision contained in Article 3, Section 1 of the California Constitution, which was ratified in California in 1849. Thus, it is appropriate to look to California legal decisions that reviewed the issue of separation of powers.

In *Staude v. Board of Election Comm'rs*, 61 Cal. 313 (1882), the California Supreme Court found that senators and members of the Assembly cannot simultaneously serve in the executive and judicial departments, as defined in Articles V and VI [of the California Constitution]. Of course, this is not an issue today because members of the California Legislature serve full-time.

Later, another California court found that employees of the executive branch could not also belong to the judicial branch. In *Elliott v. Van Delinder*, 77 Cal. App. 716, 247 P. 523 (1926), the court decided that the inhibition contained in Art III [of the California Constitution] affects the title to offices and means that no person shall hold positions under different departments of the government at the same time; a person cannot be an employee of the state department of engineering and at the same time be a justice of the peace.

Obviously, these decisions do not address the Nevada Constitution. However, they are relevant for two reasons. First, they were based on an analysis of a separation of powers provision that was identical to Nevada's

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Article 3, Section 1. Second, they support the findings of the Nevada Supreme Court in *Truesdell* and *Whitehead*.

### H. Nevada jurisprudence on dual service.

Unlike other states, the Nevada courts (through judicial decision), the Nevada Legislature (through statutory enactment), and the citizens of Nevada (through constitutional amendment), have not addressed the issue of dual service in Nevada. However, on several occasions, this office and the Legislative Counsel Bureau have been asked to opine on the issue.

Accordingly, and as requested, this office will review its own opinions as well as the two noted LCB opinions that have addressed this subject.

### I. Nevada Attorney General Opinions on dual service.

*1. The following Nevada Attorney General opinions find that an executive branch employee cannot also serve in the Legislature and that members of the Legislature cannot serve in another branch of state government.*

#### *a. Op. Nev. Att’y Gen. No. 635 (June 23, 1948).*

At issue in this opinion was whether an elected justice of the peace or sheriff could also be elected to the state Fish and Game Commission (Commission), a department of the Nevada executive branch. In relying upon Nevada’s separation of powers doctrine, this office found that a judge could not at the same time serve on the Commission, stating:

[T]he holdings of the courts adhere to the proposition that an officer holding a judicial position such as a Justice of the Peace cannot legally hold an executive office while serving as such Justice of the Peace. Otherwise, a violation of the separation of powers of government. . . . would be had. We are, therefore, constrained to hold that a Justice of the Peace cannot legally hold and fill the office of a State Fish and Game Commissioner while holding the office of Justice of the Peace.

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Op. Nev. Att’y Gen. No. 635 (June 23, 1948) at 424.<sup>3</sup>

***b. Op. Nev. Att’y Gen. No. 28 (March 12, 1951).***

At issue in this opinion was whether a member of the Legislature could duly serve as a member of the state Tax Commission Board. In concluding that the state senator could not duly serve as a member of the state Tax Commission Board, this office relied, in relevant part, on NEV. CONST. art. 3 § 1, and stated:

The language employed in Article III, section 1 of the Constitution is with sufficient precision to convey the intent. It does not merely indicate principles, but lays down a rule which forbids an officer in one of the three departments of government from holding at the same time an office in either of the other departments.

Op. Nev. Att’y Gen. No. 28 (March 12, 1951) at 114.

***c. Op. Nev. Att’y Gen. No. 183 (July 9, 1952).***<sup>4</sup>

At issue in this opinion was whether a state senator could dually serve as the director of drivers license under the motor vehicle laws of the State at the same time he served his term as state senator. Upon reviewing NEV. CONST. art. 3 § 1, and case law from other jurisdictions relative to the distinction between the exercise of legislative versus executive functions, this office concluded it was a violation of NEV. CONST. art. 3 § 1 for a state senator, during his term of office, to also exercise the duties of the position of director of drivers license for the State of Nevada.

***d. Nev. Atty. Gen. Op. No. 357 (December 22, 1954).***

At issue in this opinion was whether allowing a leave of absence for two Highway Department employees (engineers) for purposes of serving as elective members of the Legislature was permitted under Nevada’s separation of powers doctrine. In concluding that a leave of absence was not sanctioned by the separation of powers doctrine, this office stated:

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<sup>3</sup> See Op. Nev. Att’y Gen. No. 913 (April 28, 1950), affirming this opinion under similar facts.

<sup>4</sup> This matter was subsequently presented to the Nevada Supreme Court for judicial determination by way of a *quo warranto* action filed by the Nevada Attorney General. See *State ex rel. Matthews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953).

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The Department of Highways of the State of Nevada is a department belonging to the Executive Branch of the State Government. It cannot be doubted that [these employees] are and were employed by and exercising functions for and in behalf of such Executive Branch, and while so doing became elected to the Legislative Branch and proposes to obtain a leave of absence from the highway employment, serve as legislators and return to the highway employment and again assume the exercising of functions for the Executive Branch of the State Government. *We think such practice would ignore if not in fact be violative of the above-quoted constitutional provision [NEV. CONST. art. 3 § 1], and certainly against the public policy of this State. . . .*

Op. Nev. Att’y Gen. No. 357 (December 22, 1954) at 46-47 (emphasis added).

### *e. Op. Nev. Att’y Gen. No. 212 (September 21, 1956).*

At issue in this opinion was whether a member of the Legislature was barred by the separation of powers doctrine from duly serving on a state board or commission. In concluding he was barred by NEV. CONST. art. 3 § 1, this office stated that: “[I]t is clear that for a member of the Legislature to hold office as a member of a state board or commission is incompatible with this well established constitutional provision (Article 3, Section 1), for by the very nature of their office *they are in a position to enact laws and to make appropriations which directly affect the board or commission of which they are a member.* [Emphasis added.]

This opinion further found that while:

[T]here is nothing to prevent a member of a State board or commission from running for the Legislature, once elected to that august body, he must resign or be removed from the board or commission in order to gain compliance with the constitutional prohibition against holding office in separate branches of the State Government.

Based upon current research, this office finds no legal precedent that would support a departure from the legal conclusions reached within the above discussed opinions. These opinions continue to be legally sound with regard to their conclusions that executive branch employees may not duly serve as members of the Nevada Legislature.

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*2. The following Nevada Attorney General opinions address the issue of whether Article 3, Section 1 of the Nevada Constitution bars local government employees from serving in the Legislature.*

There is disagreement among former opinions of this office that address whether a local government employee is a member of the executive branch and thus is ineligible to serve in the Legislature.<sup>5</sup> The following is a synopsis of these opinions and the basis for their disagreement.

*a. Op. Nev. Att’y Gen. No 59 (May 9, 1955).*

At issue in this opinion was whether an employee (inspector and maintenance man) of the Hawthorne Elementary School District No. 7 could also serve as a member of the Nevada State Assembly. The opinion found that the employee could *not* serve in the Assembly, declaring that such service violated Section 1, Article 3 of the Nevada Constitution. The opinion, without citation to legal authority, asserted that:

[T]he school districts are political subdivisions of our State Government and a part of its executive branch. An employee of the school district is exercising a function appertaining to the executive branch. If that employee is at the same time an assemblyman, the activity is in conflict with the above-quoted constitutional provision.

Unfortunately, this opinion failed to rely upon any legal authority that addressed the issue of whether a local government employee is also a member of the executive branch of government. Therefore, this assertion can only be attributed to the personal opinion of the then-Attorney General, Mr. Harvey Dickerson.

Without an explicit legal citation to support the conclusion that a local government employee (in that instance a school district employee) is a member

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<sup>5</sup> In addition to the opinions discussed in this section, it is important to note two other Attorney General opinions that address the issue of local government employees serving in the Nevada Legislature: Op. Nev. Att’y Gen. No. 353 (November 24, 1954) (an appointed chief deputy county assessor cannot simultaneously serve as an elected state Assemblyman) and Op. Nev. Att’y Gen. No. 379 (April 30, 1958) (a city mayor cannot simultaneously serve as an elected state Assemblyman). These two prior opinions are effectively superseded by this opinion to the extent that the analysis of the two prior opinions incorrectly relies upon the proposition that the positions of the chief deputy assessor and Mayor are offices contained within the executive department of Nevada state government.

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of the executive branch of government, this office declines to rely upon the personal opinion reached by Mr. Dickerson.<sup>6</sup>

*b. Op. Nev. Att’y Gen. No. 401 (April 20, 1967).*

At issue in this opinion was whether a city fire chief, under appointment by and subject to rules and regulations of the city council, could dually serve as a member of the Legislature. In finding that the fire chief of the City of Sparks could duly serve as a member of the State Legislature without violating the separation of powers doctrine, this office, after an extensive analysis of NEV. CONST. art. 3 § 1, stated:

The main purpose of separation of powers is so that the acts of each shall not be controlled by, or subjected to, directly or indirectly, the coercive influence of either of the others. (*Humphrey v. United States*, 295 U.S. 602, 70 L.Ed. 1611.) Pursuing this reasoning, the acts of the chief of the fire department are not controlled by, nor subject to the coercive influence of the Legislature, but of the city council.

It does not necessarily follow that an entire and complete separation [between state and local government] either is desirable or was ever intended. (*Ex parte Grossman*, 267 U.S. 87, 69 L.Ed. 527; *People v. Kelly*, 347 Ill. 221, 179 N.E. 898.)

. . . Historically the requirement of the separation of powers was never applied to local governmental organizations. Thus, not only municipal corporations but counties, townships, school districts, drainage districts, and the like are frequently organized with only a single commission with all the powers, legislative, executive, and judicial, in the commission. The compelling argument in favor of this is that the closeness of local authorities to popular control affords an adequate sanction and protection.

. . . This office is therefore of the opinion that the fire chief of Sparks may, without running afoul of constitutional

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<sup>6</sup> Op. Nev. Att’y Gen. No. 59 (May 9, 1955) was effectively overruled by Op. Nev. Att’y Gen. No. 71-4 (January 11, 1971).

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prohibitions [NEV. CONST. art. 3 § 1] hold the office of member of the State Legislature simultaneously.

Op. Nev. Att’y Gen. No. 401 (April 20, 1967) at 45.

### *c. Op. Nev. Att’y Gen. No. 71-4 (January 11, 1971).*

At issue in this opinion was whether local boards of school trustees could grant leaves of absence to school teachers to serve as members of the Nevada Legislature, and whether such teachers could serve the local school districts during the periods the Legislature was not in session. This office concluded that local boards of school trustees could grant leaves of absence to school teachers to serve as members of the Nevada Legislature, and such teachers could serve the local school districts during the periods the Legislature was not in session because the constitutional requirement of separation of powers is not applicable to local government.<sup>7</sup>

This office reached its conclusion by relying on legal precedent from California, Colorado, and Maryland, each with constitutional separation of powers provisions almost identical to the one in the Nevada Constitution. These cases each held that the separation of powers provision of their respective constitutions did not apply to local government employees.<sup>8</sup>

### *d. Op. Nev. Att’y Gen. No. 168 (May 22, 1974).*

In this opinion, several questions were posed to this office primarily relating to campaign practices of employees of the department of the Nevada State Highway Patrol. However, of particular relevance was the following question: Can a member of the Highway Patrol file for an office, such as county commissioner, assemblyman, or state senator and, if elected, would there be a conflict of interest?

In answer to this question, this office stated, in pertinent part:

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<sup>7</sup> Op. Nev. Att’y Gen. No. 71-4 effectively overruled Op. Nev. Att’y Gen. No. 59 (May 9, 1955), which concluded that local school districts were part of the executive branch of government and therefore could not employ a member of the legislative branch under NEV. CONST. art. 3 § 1.

<sup>8</sup> See *County of Mariposa v. Merced Irrigation District*, 196 P.2d 920 (Cal. 1948) (it is well settled that the separation of powers provisions do not apply to local governments as distinguished from a department of the state government); *Peterson v. McNichols*, 260 P.2d 938 (Colo. 1953) (constitutional requirement of separation of powers is not applicable to local government); and *Pressman v. D’Alessandro*, 69 A.2d 453 (Md. 1949) (constitutional requirement of separation of powers is not applicable to local government).

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. . . [A] distinction may be safely made between local government elective offices and state elective offices. While an employee of the Highway Patrol could serve in the patrol and simultaneously hold a local government elective office, an employee of the patrol would have to resign his position in the patrol if he were to be elected to a *state* legislative or judicial office....

Article 3, Section 1 of the Nevada Constitution states:

The powers of the Government of the State of Nevada shall be divided into three separate departments, --the Legislative, --the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases herein expressly directed or permitted in this constitution.

An employee of the patrol helps perform the administrative functions of the state executive branch of government and, therefore, he is a member of the executive branch. Attorney General's Opinion No. 183, dated July 9, 1952. It would, therefore, be constitutionally invalid for an employee of the patrol to simultaneously serve as a member of the state legislative or judicial departments. . . . Therefore, a highway patrolman elected to the Legislature...would have to resign from the patrol. . . .

*However, Article 3, Section 1, applies only to state offices and not to local offices. Therefore, local officials and employees, such as teachers, have been permitted to serve in the Legislature. Attorney General's Opinion No. 4 [71-4], dated January 26, 1971. By the same token, a member of the patrol should be permitted to simultaneously hold a local government elective post, subject, of course, to the comments made above with regard to abstaining from action in the local government post whenever a conflict of interest was apparent with his state employment.*

[In conclusion] An employee of the Highway Patrol would have to resign his employment with the patrol if he is elected to the State Legislature. . . . *An employee of the patrol need*

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*not resign his position if elected to a local government office . . . .*

Op. Nev. Att’y Gen. No. 168 (May 22, 1974) at 33 (emphasis added).

*e. Ltr. Nev. Att’y Gen. (January 28, 2002).*

On January 28, 2002, the Nevada Department of Transportation (NDOT) asked whether an NDOT employee could run for partisan office and maintain his employment with NDOT. This office declined to issue an opinion based on a determination that an opinion issued by the Legislative Counsel Bureau on January 11, 2002, and prior opinions issued by this office, reached different conclusions concerning when a state executive department employee is performing executive functions and is therefore barred under the separation of powers doctrine from also holding an elective office in the State Legislature. This office stated:

[W]e are not persuaded that the prior published opinions from this office (AGO 183, issued July 9, 1952 and AGO 168, issued May 22, 1974) are incorrect and that the LCB’s current and more permissive interpretation of Nevada’s constitutional separation of powers doctrine would be adopted by the Nevada Supreme Court. We do agree with the LCB’s conclusion, however, that such issue can only be effectively decided by way of a judicial determination.

*f. Nevada’s long-standing historical practice of local government employees’ service in the Nevada Legislature.*

Historically, Nevada has a long-standing practice of local government employees serving in the Nevada State Legislature.<sup>9</sup> One notable example is that of Ruth Averill. In September of 1920, Miss Averill was appointed as a primary school teacher at Dyer, Fish Lake Valley. On November 2, 1920, she was the second woman elected to the Nevada State Legislature. While serving in the State Assembly during the 1921 legislative session, Miss Averill was a member of the Assembly Committee on Judiciary and the Assembly Committee on Education. In her one-term tenure with the Legislature, Miss Averill did take a leave of absence from her classroom.

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<sup>9</sup> We appreciate the research of State Archivist, Guy Rocha, in finding these historical examples of local government employees serving in the Nevada Legislature.

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Similarly, Miss Averill's father, Mark Richards Averill, also served as the clerk of a local school district during his tenure in the 1903 Nevada Legislature. A more recent example is that of Clark County Assemblywoman and State Senator Helen Herr who held positions in local government (the East Las Vegas Town Board and the Ground Water Board of Clark County) during her tenure with the Nevada Legislature from 1957 to 1967.

### *g. California Case Law.*

One early, well-considered example from California that provides that the separation of powers doctrine does not apply to local government employees occurred in *People ex rel. Attorney General v. Provines*, (34 Cal. 520)(1868). There, the Court stated:

Our only remaining duty in connection with this case is to declare what we consider to be the true meaning and scope of the Third Article of the Constitution [separation of powers].

We understand the Constitution to have been formed for the purpose of establishing a State Government; and we here use the term "State Government" in contradistinction to local, or to county or municipal governments. But by this we do not intend to be understood to say that local governments are not within the general plan of the Constitution, for such governments are necessary incidents to all forms of government--using that term in its most enlarged and popular sense--in use among civilized nations. What we mean to be understood as saying, is that the Constitution does not, of itself--*ex proprio vigore*--create or establish any local or municipal governments. . . .

. . . .

[T]he creation and regulation of local and subordinate governments, such as county, city and town governments, is not attempted in the Constitution; and that the whole subject of local and subordinate governments is, by that instrument, turned over to one branch of the Government, which it provides and defines, with certain admonitions only for its guidance. *When, therefore, the Constitution is speaking of the "powers of Government," and engaged in the work of distributing them to different departments, and securing absolute independence to each department by providing that each shall be worked and managed by a different set or class*

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*of individuals, of what Government is it talking? Certainly not of town, city, village or county governments, which it does not undertake to organize, which are not being established, but are to be established hereafter by a body which the Constitution is at the time creating and organizing. Obviously it is talking about the government upon which it is at work, and it is the powers of that government alone which it is declaring, distributing and guarding; that is to say, the State Government, as contradistinguished from those which are to be hereafter created by legislative will, merely, as the incidents and auxiliaries of the former. The departments, therefore, of which it speaks, and in respect to which it provides that no person employed in one shall be employed in either of the other two, are the Departments of the State Government, as expressly defined and limited in the Constitution; and its meaning is that no member of the Legislative Department, as there defined, shall at the same time be a member of the Executive or Judicial Departments, as there defined, and vice versa.*

. . . .

In short, the Third Article of the Constitution means that the powers of the State Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments . . . .

***Id.*** at 532-534 (underline emphasis supplied; italics emphasis added).<sup>10</sup>

Simply put, the court found that the framers of the California Constitution did not contemplate that the state government executive branch included local government. Therefore, California's separation of powers doctrine did not apply to local governments or its employees.

As previously noted, this California distinction is critical to the instant analysis because it is well settled that the framers of the Nevada Constitution modeled the Nevada Constitution after the California Constitution. *Aftercare of Clark County v. Justice Court of Clark County*, 120 Nev. \_\_\_, 82 P.3d 931,

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<sup>10</sup> See *State of Indiana v. Monfort*, 723 N.E.2d 407 (Ind. 2000) (the separation of powers doctrine applies only to executive government, not municipal or local governments).

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935 (Adv. Op. 2 at 5, January 23, 2004) (“For instance, California, which provided the predicate for the Nevada Constitution . . .”).

In light of the absence of Nevada authority on the subject of the applicability of the separation of powers to local governments and Nevada’s adoption of the California separation of powers provision into the Nevada Constitution, the findings in *Provines* provide strong support for the contention that Article 3, Section 1 of the Nevada Constitution does not apply to local governments.

Based upon the foregoing legal precedent, historical practice of this state, and the relevant Nevada Attorney General opinions, this office concludes that the constitutional requirement of separation of powers does not prohibit a local government employee from also serving in the Nevada Legislature.

### **J. Opinions of the Legislative Counsel Bureau.**

As stated above, this office has previously expressly declined to follow the opinions of the Legislative Counsel Bureau dated February 4, 2002, and January 23, 2003, which find that employees serving in departments of the state executive branch of government can duly serve as members of the Legislature. We are still not persuaded that the Nevada’s constitutional separation of powers doctrine would allow such a practice and therefore continue to disagree with the opinions of the LCB.

Despite this disagreement, it is important for this office to review the LCB opinions and discuss the basis for our disagreement.

#### ***1. Legislative Counsel Bureau Opinion – February 4, 2002.***

The LCB opinion of February 4, 2002, was in response to an inquiry from Assemblyman Lynn Hettrick asking whether a person who is employed as a Senior Petroleum Chemist with the Nevada State Department of Agriculture (DOA) could become a candidate for a seat in the Nevada Legislature and, if elected, serve as a member of the Nevada Legislature while remaining an employee of the DOA. In answering Assemblyman Hettrick’s question, LCB concluded the following, in verbatim:<sup>11</sup>

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<sup>11</sup> The first three conclusions of the 2002 LCB opinion deal with the doctrine of “statutory incompatibility.” Conclusions four through seven deal with separation-of-powers, and the final conclusion addresses the doctrine of “common-law incompatibility.”

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1. Because a position of public employment with the DOA is not an elective office, it is the opinion of this office that NRS 281.055 does not prohibit an employee of the DOA from becoming a candidate for or serving in the Nevada Legislature while remaining an employee of the DOA;

2. A classified employee of the DOA may become a candidate for or serve in the Nevada Legislature without violating Chapter 284 of the Nevada Revised Statutes or the code of regulations for classified employees, so long as the classified employee observes the limitations on political activity set forth in NAC 284.770.

3. An unclassified employee may become a candidate for and serve in the Nevada Legislature if the unclassified employee satisfies the requirements of NRS 284.143. However, if the unclassified employee is unable to satisfy the requirements of NRS 284.143, it is the opinion of this office that the appointing authority has the right to prohibit the unclassified employee from becoming a candidate for or serving in the Nevada Legislature and that such a prohibition would be constitutional.

4. The Nevada separation of powers provision would not prohibit an employee of the DOA from serving in the Nevada Legislature.<sup>12</sup>

5. In sum, it is the opinion of this office that the separation-of-powers provision in the state constitution only prohibits a member of the Legislature, during his term, from holding a constitutional office or a nonconstitutional office in another department of state government, because a person who holds a constitutional or nonconstitutional office exercises sovereign functions appertaining to another department of the state government. However, it is also the opinion of this office that the separation-of-powers provision in the state constitution does not prohibit a member of the Legislature, during his term, from occupying a position of public employment in another department of state government, because a person in a position of public employment does not exercise any sovereign functions appertaining to another department of the state government.

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<sup>12</sup> Because Nevada courts have never directly addressed the issue, LCB made this determination, analyzing differing conclusions from other states, and adopted this finding based upon the reasoning of the courts of Montana, New Mexico, and Colorado.

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Based on this construction of section 1 of article 3, the deciding issue under the Nevada Constitution is whether a person employed as a Senior Petroleum Chemist by the DOA is a public officer or a public employee. If such a person is a public officer, then the person would be prohibited by the separation-of-powers provision from serving in the Nevada Legislature. However, if such a person is not a public officer, but is simply a public employee, then the person would not be prohibited by the separation-of-powers provision from serving in the Nevada Legislature.

6. Based upon the reasoning in *Mathews*<sup>13</sup>, we believe that the position of Senior Petroleum Chemist with the DOA is a position created by administrative authority and discretion, not by statute. Moreover, based on the statutory structure of the DOA, we believe that most employees of the DOA do not exercise any of the sovereign functions of the state. Rather, those employees simply implement the policies made by higher-ranking state officials.

7. In light of the statutory authority set forth in chapter 561 of NRS, it is clear that the Bureau of Petroleum Technology and the positions within that bureau are not created by statute. Rather, they are the products of the administrative authority and discretion granted to the director of the DOA pursuant to chapter 561 of NRS. Furthermore, we believe that the sovereign functions of the DOA are exercised by the ten-member state board of agriculture, the director and the deputy director, and that other personnel of the DOA are simply subordinate and responsible to these higher-ranking state officials. Therefore, it is the opinion of this office that a person who is employed as a Senior Petroleum Chemist in the Bureau of Petroleum Technology is not a public officer, but is simply a public employee. Accordingly, it is also the opinion of this office that, because such a person is not a public officer, the person may serve in the Nevada Legislature while remaining an employee of the DOA without violating the separation-of-powers provision in section 1 of article 3 of the Nevada Constitution.

8. . . . [B]ecause the Legislature's control over an individual classified employee in the Bureau of Petroleum Technology is extremely attenuated and indirect, we believe that

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<sup>13</sup> *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953).

## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

employment in the position of Senior Petroleum Chemist in the Bureau of Petroleum Technology is not inherently inconsistent or repugnant with membership in the Nevada Legislature. It is the opinion of this office, therefore, that the common law doctrine of incompatibility does not prohibit a person who is employed in the position of Senior Petroleum Chemist in the Bureau of Petroleum Technology from serving in the Nevada Legislature.

### *2. Legislative Counsel Bureau Opinion – January 23, 2003.*

The LCB opinion of January 23, 2003, was in response to an inquiry from Assemblyman Jason Geddes asking whether he may serve as a member of the Nevada Legislature while remaining employed by the University and Community College System of Nevada (UCCSN)<sup>14</sup> in the position of Environmental Affairs Manager. In applying virtually the identical analysis as in the LCB opinion to Assemblyman Hettrick, LCB concluded the following, in verbatim:

With few exceptions, NRS 281.055 prohibits a person from holding more than one elective office at the same time. However, by its plain terms, NRS 281.055 is limited in its application to elective offices. Because your position as an Environmental Affairs Manager with the UCCSN is not an elective office, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the provisions of NRS 281.055.

Pursuant to NRS 284.143, an unclassified employee is permitted to serve in the Nevada Legislature if the employee obtains the approval of his supervisor and the employee is otherwise able to carry out his duties as an unclassified employee and his duties as a member of the Nevada Legislature without undue conflict, such as by taking a leave of absence. Thus, it is the opinion of this office that, if you take a leave of absence without pay from your unclassified employment to serve in the Nevada Legislature, you are

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<sup>14</sup> Of note, the UCCSN and the Board of Regents are part of the executive branch of government.

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entitled pursuant to NRS 281.127 to receive legislative pay for your service as a legislator.

It is the opinion of this office that the separation-of-powers provisions in the Nevada Constitution prohibits a member of the Nevada Legislature from holding a public office in the executive branch of state government, because a person who holds such a public office exercises sovereign functions of the state. However, it is also the opinion of this office that the separation-of-powers provisions does not prohibit a member of the Nevada Legislature from occupying a position of public employment in the executive branch of state government, because a person in a position of public employment does not exercise any of the sovereign functions of the state.

After applying the well-established case law from the Nevada Supreme Court which sets out the test for distinguishing between a position of public employment and a public office, it is the opinion of this office that your position as an Environmental Affairs Manager with the UCCSN is a position of public employment, not a public office.

Therefore, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental Affairs Manager without violating the separation-of-powers provisions in section 1 of article 3 of the Nevada Constitution.

Furthermore, because the Nevada Legislature's control over your position as an Environmental Affairs Manager with the UCCSN is extremely attenuated and indirect, we believe that your employment with the UCCSN is not inherently inconsistent or repugnant with membership in the Nevada Legislature. Therefore, it is the opinion of this office that you may serve in the Nevada Legislature while remaining employed by the UCCSN in the position of Environmental

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Affairs Manager without violating the common law doctrine of incompatibility.<sup>15</sup>

Although the LCB opinions are thorough and well considered, they improperly reach the conclusion that the restrictions contained in Article 3, Section 1 of the Nevada Constitution do not apply to an executive branch employee if the employee does not hold an employment position that is a “public office” as defined in *State ex rel. Mathews v. Murray*, 70 Nev. 116, 258 P.2d 982 (1953).

It is the opinion of this office that the LCB’s reliance upon *State ex rel. Mathews v. Murray* is misplaced and we therefore decline to follow the conclusion reached in either of the LCB opinions.

The facts of the *Mathews* decision are straightforward. John H. Murray, a state senator, accepted the position of director of the drivers’ license division of the public service commission, an undisputed executive branch position, while he was serving as a legislator.<sup>16</sup> Thereafter, Mr. Mathews, the state Attorney General, brought an action in *quo warranto*, seeking to have Mr. Murray removed from office because he felt that the director’s position was a “public office” and he therefore could not hold both positions simultaneously because of the restrictions of Article 3, Section 1 of the Nevada Constitution.

The Nevada Supreme Court found that the Attorney General’s claim of *quo warranto* would not lie because the position sought by Mr. Murray was not a “public office.” The Court reached this conclusion because the director’s position was not created by law or the constitution and Mr. Murray served at the pleasure or control of someone else within the department.

Significantly, the Nevada Supreme Court never analyzed whether Mr. Murray’s dual employment violated Nevada’s constitutional separation of powers doctrine because it did not need to review that issue for two reasons. First, it made a procedural decision to dismiss the case because it had decided that the Attorney General’s method to remove Mr. Murray, *quo warranto*, was improper because the director’s position was not a “public office.”<sup>17</sup>

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<sup>15</sup> LCB also opined on the Hatch Act; we are not addressing this portion of the opinion because it is not relevant to the question presented.

<sup>16</sup> Interestingly, Mr. Murray voluntarily resigned his position as a state senator to accept the position with the Public Service Commission. The decision does not mention whether he did so in recognition of the restrictions contained in Article 3, Section 1 of the Nevada Constitution.

<sup>17</sup> At common law, an information in the nature of *quo warranto* will lie only for usurping a substantive public office, not simply the function or employment of a deputy or servant held at the will and pleasure of another. *State ex rel. Ryan v. Cronan*, 23 Nev. 437, 49 P. 41 (1897).

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Second, the Court also did not have to decide whether Mr. Murray's dual employment violated the constitution because Mr. Murray, as aforementioned, had already voluntarily resigned his position as a state senator.

Simply put, had the Attorney General brought the action through another proper procedural method and if Mr. Murray had not resigned, the Court would have taken up the question of whether his holding dual positions violated Article 3, Section 1 of the Nevada Constitution. Of course, this did not occur and therefore the *Mathews* decision is not applicable to the current analysis.

In summary, the LCB opinions conclude that under the incompatibility and the separation of powers doctrines, two employees serving in the executive branch of government are not precluded from duly serving in the Legislature. However, these conclusions are improper for two important reasons.

First, there is no relevant legal authority in Nevada that supports or even recognizes the common law incompatibility doctrine.<sup>18</sup>

Second, the Nevada cases that discuss the distinction between public officers versus public employees are simply irrelevant to the contention that executive branch employees can also serve in the legislature without violating Article 3, Section 1 of the Nevada Constitution.<sup>19</sup>

In closing, it is important to repeat United States Supreme Court Justice Louis Brandeis in his dissenting opinion of *Myers v. United States*, 272 U.S. 293 (1926):

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

(..continued)

Moreover, NRS 35.010 provides that a civil action in *quo warranto* may be brought against a "person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, except the office of assemblyman or state senator . . . ." or a "public officer, civil or military, except the office of Assemblyman or State Senator, who does or suffers an act which, by the provisions of law, works a forfeiture of his office." See NRS 35.010(1) and (2).

<sup>18</sup> See n.2.

<sup>19</sup> Moreover, LCB's analysis and conclusions would require a case-by-case assessment of an executive branch employee's functions and duties to determine whether serving as a member in the Legislature violated the separation of powers clause. Not only is this an unnecessary endeavor, but clearly not the intent of the express language of Nevada's separation of powers doctrine.

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CONCLUSION

It is the opinion of this office that Article 3, Section 1 of the Nevada Constitution bars any employee from serving in the executive branch of government and simultaneously serving as a member of the Nevada State Legislature.

Further, it is the opinion of this office that the constitutional requirement of separation of powers is not applicable to local governments. Accordingly, absent legal restrictions unrelated to the separation of powers doctrine, a local government employee may simultaneously serve as a member of the Nevada Legislature.

BRIAN SANDOVAL  
Attorney General

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AGO 2004-04 PAROLE BOARD; PARDONS; PENALTIES: The Nevada Board of Pardons Commissioners (Pardons Board) cannot commute a sentence of death or life without the possibility of parole to a sentence that would allow parole if the underlying offense was committed on or after July 1, 1995. However, a sentence stemming from an offense committed before July 1, 1995, can be commuted to a sentence that allows for parole. If the Pardons Board commutes such a sentence to allow for parole, the Nevada Board of Parole Commissioners' power to release the prisoner on parole would be subject to the limitations set forth in NRS 213.1099(4) if the offense was committed on or after November 2, 1982. If a prisoner receiving such clemency committed his offense before November 2, 1982, the commutation allowing for parole would be without the restrictions of NRS 213.1099(4), unless otherwise provided by the Pardons Board.

Carson City, March 25, 2004

Dorla M. Salling, Chairman, Nevada Board of Parole Commissioners; 1445 Hot Springs Road, #108-B, Carson City, Nevada 89711

Dear Ms. Salling:

As Chairman of the Nevada Board of Parole Commissioners (Parole Board), you have requested an opinion on the following question:

### QUESTION

If the Nevada Board of Pardons Commissioners (Pardons Board) commutes a prisoner's sentence of death or life without the possibility of parole to a lesser penalty allowing for parole, can the Parole Board release such a prisoner on parole if the minimum criteria set forth in NRS 213.1099 have not been met?

### ANALYSIS

Clemency encompasses the power to commute a sentence. Commutation is the changing of one sentence to another, while a pardon absolves a defendant of the crime altogether. *See Colwell v. State*, 112 Nev. 807, 813, 919 P.2d 403, 407 (1996) (citing *Pinana v. State*, 76 Nev. 274, 281-83, 352 P.2d 824, 829 (1960) (finding that parole, pardon, and commutation are each distinguishable)).

Article 5, Section 14 of the Nevada Constitution empowers the Pardons Board to condition, limit, or restrict a pardon or commutation of punishment "as they may think proper." However, Article 5, Section 14(2) of the Nevada Constitution, which amended the Nevada Constitution around the same time the Nevada Legislature (Legislature) enacted NRS 213.1099(4), resulted in the Pardons Board retaining the power to commute a sentence of death or life

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without the possibility of parole to a sentence allowing for parole subject to NRS 213.1099(4). See *Smith v. State*, 106 Nev. 781, 802 P.2d 638 (1990) as withdrawn and replaced with substituted opinion reported at 1990 Nev. LEXIS 170 at \*6 (Nov 28, 1990).

In *Sims v. State*, 107 Nev. 438, 814 P.2d 63 (1991), the Nevada Supreme Court acknowledged its decision in *Smith* and reiterated that the Pardons Board retained the power under Nevada constitutional and statutory law “to commute a sentence of life without the possibility of parole to a sentence allowing for parole.” *Id.* at 440. The *Sims* court recognized that a prisoner receiving such clemency would still have to serve at least a 20 year sentence. It stated, “This means that Sims could receive parole consideration after only ten years beyond the ten-year sentence he could have received for the immediate offense of grand larceny.” *Id.*

The *Smith* court reasoned that, in enacting Article 5, Section 14(2) of the Nevada Constitution, the Legislature did not attempt to eliminate the power of the Pardons Board to commute such sentences, but rather that the Legislature intended to place restrictions on the Parole Board incident to the new constitutional amendment. The *Smith* court explained:

In 1982, article 5, section 14(2) of the Nevada Constitution was added to read as follows:

2. Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole.

*NRS 213.1099(4) was enacted along with article 5, section 14(2) of the Nevada Constitution so as to become effective if and only if the constitutional amendment above was approved by the voters.* That statute reads as follows:

4. Except as otherwise provided in NRS 213.1215 [concerning mandatory parole for some prisoners], the board may not release on parole a prisoner whose sentence to death or to life without possibility of parole has been *commuted to a lesser penalty unless it finds that the prisoner has served at least 20 consecutive years in the state prison*, is not under an order that he be detained to answer for a crime or violation of parole or probation in another jurisdiction, and that he has no history of:

- (a) Recent misconduct in the institution, and that he has been recommended for parole by the director of the department of prisons;
- (b) Repetitive criminal conduct;
- (c) Criminal conduct related to the use of alcohol or drugs;
- (d) Repetitive sexual deviance, violence or aggression; or

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(e) Failure in parole, probation, work release or similar programs.

*Smith v. State*, 1990 Nev. LEXIS 170 at \*3-4 (emphasis added).<sup>1</sup> The Nevada Supreme Court observed:

The amendment of the Nevada Constitution, when read with NRS 213.1099(4), *creates an ambiguity* in Nevada law. The Nevada Constitution allows for the commutation of a sentence of life without parole “as may be provided by law.” NRS 213.1099(4) appears to contemplate that such sentences may be commuted. Nevertheless, NRS 213.1099(4) does not contain any express language granting the board of pardons authority to commute a sentence of life without the possibility of parole to a sentence allowing for parole. Instead, NRS 213.1099(4) simply provides certain restrictions on granting parole to prisoners whose sentences have been commuted. The argument could be made, therefore, that these restrictions were intended to apply only to commutations made before the amendment of the Nevada Constitution. We do not believe this construction of the statute reflects the true intent of the legislature.

*Id.* at 3-4 (emphasis added). The Nevada Supreme Court also noted that “no other Nevada statute provides for commutation of sentences of death or of life without the possibility of parole.” *Id.* at 4, n.1. The *Smith* court continued:

*The fact that the legislature enacted, at the same time the constitution was amended, a set of restrictions on the parole board regarding parole for prisoners whose sentences had been commuted, and expressly conditioned the operation of the statute on the passage of the constitutional amendment, suggests that the legislature was not attempting to eliminate the power of the board of pardons to commute such sentences, but rather that the legislature intended to place restrictions on the parole board incident to the new*

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<sup>1</sup> Article 5, Section 14(2) of the Nevada Constitution was approved by the voters in the 1982 general election, on November 2, 1982. NRS 213.1099(4) initially refers to NRS 213.1215, which deals with the mandatory parole release of certain prisoners. Nonetheless, the Parole Board may still deny parole if at least two months before the prisoner could be paroled there is a reasonable probability that he would be a danger to public safety while on parole. The Parole Board could then require the prisoner to serve the balance of his sentence. Also, if the prisoner is the subject of a lawful request from another law enforcement agency that he be held or detained for release to that agency, the prisoner must be released to that agency. In addition, if the Department of Public Safety’s Division of Parole and Probation has not completed its establishment of a program for the prisoner’s activities during his parole, the prisoner would be released on parole as soon as practicable after the prisoner’s program is established.

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*constitutional amendment.* The inference that may be drawn from the statute is that the legislature intended that the *commutation power would continue to exist*, albeit with *restrictions on the parole of prisoners whose sentences had been commuted.*

*Id.* at 4-5 (emphasis added). Accordingly, after the Section 14(2), Article 5 amendment to the Nevada Constitution, the Nevada Supreme Court recognized that the commutation of a sentence of death or life without the possibility of parole, to allow for parole, would be subject to NRS 213.1099(4).

The *Smith* court concluded that interpreting Article 5, Section 14(2) of the Nevada Constitution and NRS 213.1099(4) as stripping the Pardons Board of its power to commute sentences of life without parole “would produce an especially harsh result.” *Id.* at 5. The example used was the habitual criminal. It said:

Assuming, without deciding, that the state constitution may, consistent with the United States Constitution, decree that such a defendant could never have his sentence reviewed by the board of pardons, he would die in prison, possibly having served sixty or seventy calendar years behind bars. When compared to other sentences imposed for violent crimes in this state, this result appears entirely unfair. . . . We are unwilling to ascribe to the legislature a motive to create the result of the example above unless and until the legislature expresses such an intent in clear and unambiguous terms.

*Id.* at 5-6.

In 1995, however, the Legislature passed NRS 213.085 which, in conjunction with Article 5, Section 14(2) of the Nevada Constitution, prohibits the Pardons Board from commuting a sentence of death or life without the possibility of parole to a sentence that would allow parole. The Nevada Supreme Court has determined that NRS 213.085 must not be applied retroactively. *See Miller v. Ignacio*, 112 Nev. 930, 937, 921 P.2d 882, 886 (1996); *Sonner v. State*, 114 Nev. 321, 326-27, 955 P.2d 673, 677 (1998); and *Thomas v. State*, 120 Nev. Adv. Rep. 7, at 10 (February 10, 2004). Accordingly, the Pardons Board cannot commute a sentence of death or life without the possibility of parole to a sentence that would allow parole if the underlying offense was committed on or after July 1, 1995, the effective date of NRS 213.085. A sentence of death or life without the possibility of parole, stemming from an offense committed before July 1, 1995, can be commuted to a sentence that allows for parole subject to NRS 213.1099(4).

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With respect, however, to commuting sentences of death or life without the possibility of parole where the offense was committed before July 1, 1995, the Nevada Supreme Court said: “We conclude, therefore, that the board of pardons retains the power to commute a sentence of life without the possibility of parole to a sentence allowing for parole, and that the parole board is subject to the restrictions of NRS 213.1099(4).” *Smith v. State*, 1990 Nev. LEXIS 170 at \*6.

In *Schick v. Reed*, 419 U.S. 256 (1974) the U. S. Supreme Court stated, “The executive pardoning power under the Constitution, which has consistently adhered to the English common-law practice, historically included the power to commute sentences on conditions not specifically authorized by statute.” *Id.* at 256 (internal citation omitted). It said: “[T]he conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute.” *Id.* at 264. Clemency, which may take the form of a conditional commutation of sentence may have “conditions which are in themselves constitutionally unobjectionable.” *Id.* at 266 (emphasis added). Thus, limitations on the clemency power of the Pardons Board must be found in the Nevada Constitution.

In conditioning grants of clemency, the Pardons Board has broad discretion. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 282 (1998). However, it cannot impose a condition that may result in an increased punishment and the limitations found at Article 5, Section 14(2) of the Nevada Constitution, read in conjunction with NRS 213.1099(4) and NRS 213.085, must be heeded.

The *Smith* court considered the Legislature’s intent. Considering Assembly Bill 386 (A.B. 386), which was approved on June 2, 1981, and codified at NRS 213.1099(4), it was explained that this bill would result in the exceptions to Assembly Joint Resolution 30 (A.J.R. 30). A.J.R. 30 became Article 5, Section 14(2) of the Nevada Constitution. *See Hearing on A.B. 386 Before the Assembly Comm. on Judiciary*, 1981 Leg., 61<sup>st</sup> Sess. 1 (April 27, 1981). It was further explained that, under the changes, a commuted prisoner would still have to serve a minimum number of years before he could be released on parole. *Id.* at 2.

As indicated in the committee minutes regarding the hearing on A.J.R. 30, Assemblyman Horn testified that the average person believed that when a criminal was sentenced to death or life without the possibility of parole the offender would never get out of prison. But, he pointed out, that is not the case due to the ability of the Pardons Board to commute sentences. He referred to a case former District Attorney Bob Miller supplied to the committee. In that case, the prisoner serving life without parole was eventually released

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(presumably after commutation and parole) after serving 13 years. He concluded he had been advised that the only way to address such a situation would be through a constitutional amendment. *See Hearing on A.J.R. 30 Before the Assembly Comm. on Judiciary*, 1979 Leg., 60<sup>th</sup> Sess. 4–5 (May 7, 1979). Former Washoe County District Attorney Cal Dunlap testified in support of A.J.R. 30 and Senator Raggio pointed out that the matter could not be addressed by statute because the commutation power “is embodied in a constitutional provision.” *Hearing on A.J.R. 30 Before the Assembly Comm. on Judiciary*, 1979 Leg., 60<sup>th</sup> Sess. 2 (May 15, 1979). Senator Dodge expressed “that he was satisfied that the public supports this concept. . . . He further stated that he supported Senator Close’s suggestion which would allow for legislative direction in the commutation of sentences.” *Id.* at 3. “Senator Raggio concurred and suggested an amendment such as ‘A sentence of death or life without may not be commuted to a sentence that would allow parole except as may be provided by law.’” *Id.*

During the following legislative session in 1981, with respect to A.J.R. 30, it was noted that: “[I]n order for a constitutional amendment to go to the voters it has to go through two sessions of the Legislature in identical format.” *Hearing on A.J.R. 30 Before the Assembly Comm. on Judiciary*, 1981 Leg., 61<sup>st</sup> Sess. 2-3 (January 27, 1981). It was explained that the constitutional amendment would “allow the Legislature, in its wisdom, to build in certain conditions.” *Id.* at 4.

As for the Pardons Board’s ability to simply pardon a prisoner sentenced to death or life without the possibility of parole:

Senator Raggio questioned if this [constitutional] amendment is enacted, would the Board of Pardons still be able to reach the same decisions by going through the pardon process, rather than the commutation process. Assemblyman Horn stated this would be a decision of the Board, he hoped they would not pardon criminals with life without the possibility of parole sentences or death sentences. Senator Raggio stated the Board does have the authority to pardon and could possibly abuse or utilize it in another manner.

*Hearing on A.J.R. 30 Before the Assembly Comm. on Judiciary*, 1981 Leg., 61<sup>st</sup> Sess. 4 (February 25, 1981). It was stated that: “[T]his amendment still provides the opportunity for the pardons board to meet and make a determination at some date whether or not a pardon will be granted to an individual.” *Id.* at 6. It was explained that, after the constitutional amendment, laws could establish “times when life without the possibility of parole may be commuted.” *Id.* at 8.

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With respect to Senator Raggio's thought in 1981 that the Pardons Board might be able to creatively circumvent the constitutional amendment and pertinent statutes with its pardon power, consider what the Nevada Supreme Court said fifteen years later in *Miller v. Ignacio*, 112 Nev. 930, 921 P.2d 882 (1996). The *Miller* court stated:

We note that, although the Pardons Board has, since 1973, commuted twenty-seven "life without" sentences for first-degree murder to sentences that would allow parole, not once during this period has it granted a pardon to someone serving a sentence of life without the possibility of parole. Moreover, *we cannot accept, as suggested by the State during oral argument, that the Pardons Board can mitigate the punitive effects of NRS 213.085 by simply shifting their modus operandi to the granting of "conditional pardons" allowing for deferred release dates and supervision by parole authorities.* We believe that the legislature intended more than simply to remove the parole boards from the clemency process. We conclude that the State's interpretation of NRS 213.085(1) would render the statute a nullity, a result that could not have been the intent of the legislature in adopting NRS 213.085.

*Miller*, 112 Nev. at 936-37, 921 P.2d at 885-86 (1996) (emphasis added). The *Miller* court noted that "if the powers of commutation and pardon were interchangeable the intended deterrent effect of the statutory amendment would be substantially vitiated." *Id.* at n.5. This is consistent with the position recognized by the Nevada Supreme Court that the powers of the Pardons Board cannot be delegated. *See Creps v. State*, 94 Nev. 351, 360 at n.8, 581 P.2d 842, 848 at n.8 (1978). In light of the constitutional amendment contained in Section 14(2) of Article 5 of the Nevada Constitution, adopted by Nevada voters in the 1982 general election, the Legislature may place substantive limitations upon the Pardons Board's power to commute sentences of death and life without the possibility of parole. By adding Section 14(2) of Article 5 to the Nevada Constitution, the voters conferred upon the Legislature the authority to restrict the Pardons Board's power with respect to commuting such sentences.

Article 5, Section 14(2) to the Nevada Constitution went into effect on November 2, 1982. This constitutional amendment was proposed and passed by the 1979 Legislature, agreed to and passed by the 1981 Legislature, and approved and ratified by the Nevada voters at the 1982 general election. *See* 2 A.J.R. 30, 1979 Nev. Stat. 2005, and 2 A.J.R. 30, 1981 Nev. Stat. 2097. The effective date of NRS 213.1099(4) was also November 2, 1982. *See* Act of June 2, 1981, ch. 450, 1981 Nev. Stat. 871-872. Following the rationale in *Miller*, 112 Nev. at 937, NRS 213.1099(4) should not be applied retroactively.

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Accordingly, the Pardons Board can commute a sentence of death or life without the possibility of parole to allow for parole if the underlying offense was committed before July 1, 1995. If the prisoner receiving such clemency committed his offense on or after November 2, 1982, such a commutation would be subject to the restrictions of NRS 213.1099(4). If such a prisoner committed his offense before November 2, 1982, the commutation allowing for parole would not be governed by the restrictions of NRS 213.1099(4), unless otherwise provided by the Pardons Board.

### CONCLUSION

The Nevada Board of Pardons Commissioners (Pardons Board) cannot commute a sentence of death or life without the possibility of parole to a sentence that would allow parole if the underlying offense was committed on or after July 1, 1995. However, such a sentence stemming from an offense committed before July 1, 1995, can be commuted to a sentence that allows for parole. If the Pardons Board commutes such a sentence to allow for parole, the Nevada Board of Parole Commissioners' power to release the prisoner on parole would be subject to the limitations set forth in NRS 213.1099(4) if the offense was committed on or after November 2, 1982. If a prisoner receiving such clemency committed his offense before November 2, 1982, the commutation allowing for parole would be without the restrictions of NRS 213.1099(4), unless otherwise provided by the Pardons Board.

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